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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MEYNARDO MONTEMAYOR and MANUEL MONTEMAYOR,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Whether the petitioners' convictions were contrary to fundamental fairness and due process of law because the evidence was insufficient to support a conspiracy charge, the court allowed co-defendant hearsay statements into evidence, the court denied motions for a bill of particulars, the indictment was vague, and highly prejudicial testimony with no bearing to the charges alleged in the indictment was allowed into evidence?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Meynardo Montemayor and Manuel Montemayor hereby petition that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on April 4, 1983.

OPINION BELOW

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit was entered on April 4, 1983 (No. 82-2129). The opinion is reported in the Federal Reporter Second Series and is contained in the Appendix at Page 1.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 4, 1983 (82-2029) affirming petitioners' convictions and sentences entered by the United States District Court for the Southern District of Texas, Brownsville Division on March 9, 1982. The jurisdiction of this court is involved under and pursuant to 28 U.S.C., Sec. 1254(1).

STATUTES INVOLVED

Section 841 of 21 U.S.C. provides:

> "(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance."

Section 846 of 21 U.S.C. provides:

> "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

Section 959 of 21 U.S.C. provides:

> "It shall be unlawful for any person to manufacture or distribute a controlled substance in schedule I or II
>
> (1) intending that such substance will be unlawfully imported into the United States; or
>
> (2) knowing that such substance will be unlawfully imported into the United States.
>
> This section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States. Any person who violates this section shall be tried in the United States District Court at the point of entry where such person enters the United States, or in the United States District Court for the District of Columbia."

Section 963 of 21 U.S.C. provides:

> "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

STATEMENT OF THE CASE

Defendants-Appellants, Meynardo Montemayor and Manuel Montemayor appealed to the United States Court of Appeals for the Fifth Circuit from a judgment entered by the United States District Court for the Southern District of Texas, after a jury verdict was returned finding the petitioners guilty of separate conspiracies to unlawfully distribute quantities of cocaine (Count 3), heroin

(Count 4), and marijuana (Count 5) in violation of Title 21, U.S.C., Sec. 846 and 841(a)(1); and guilty of conspiracy to unlawfully manufacture and distribute heroin knowing such substance would be imported into the United States (Count 9) in violation of Title 21, U.S.C., Sec. 963 and 959. The trial court sentenced the defendants to 15 years in the custody of the United States Attorney.

The Fifth Circuit Court of Appeals affirmed the judgment of the District Court on Count 3, conspiracy to distribute cocaine, and vacated the convictions of each appellant on the remaining Counts 4, 5 and 9. The Court of Appeals reasoned that since there was sufficient evidence to support Count 3, it need not consider the remaining counts.

The government charged that the petitioners conspired with Benito, Matias, and Reyes Montemayor (all brothers), and Alifonso Arrendonda, Salvador Flores, and Joe Garcia to distribute cocaine in the Southern District of Texas.

On December 26, 1981 the petitioners filed motions to sever (R-35-36), application for change of venue (R-38), and motions to dismiss. (R-40-41). All motions with the exception of the motions for change of venue were subsequently denied by the trial court. (R-70). The trial of the case was transferred to Houston due to prejudicial pretrial publicity.

On January 26, 1982 the jury trial commenced with three of the eight named defendants on trial. Co-Defendant, Alifonso Arrendonda, was granted a mistrial at the close of the trial, and at a subsequent trial was found not guilty. The other five defendants either pleaded guilty to reduced charges, were tried separately, or fugitated.

On January 28, 1982, the court dismissed counts 6, 7, 8, 14, 15, and 16 of the indictment following the filing of a motion for judgment of acquittal. (R-76). On January 29, 1982 petitioners' motion in limine regarding witness Jessie Gutierrez and a motion for mistrial were filed with the trial court. (R-77). The motions were both overruled. In addition, the trial court overruled the petitioners' objections to the court's jury charge. (R-79).

On February 1, 1982, the jury returned a verdict finding the petitioners guilty on counts 3, 4, 5, and 9. (R-84). After the verdicts had been read, the petitioners requested the jury be polled. A juror stated the verdict was contrary to her belief. Rather than retiring the jury for further deliberation, the trial court called for a court reporter and began to repoll the jury. Even though the juror persisted in her uncertainty, the trial court ruled the verdicts were unanimous. The petitioners filed a motion for a mistrial. (R-82). It was denied as to the petitioners, but granted as to co-defendant, Alifonso Arrendonda.

On February 5, 1982, petitioners filed a motion for a new trial and/or judgment notwithstanding the verdict, (R-90), a motion in arrest of judgment (R-91), a motion for mistrial (R-92) and a motion for leave to interrogate jurors. (R-93). The trial court denied all of the motions.

The petitioners were sentenced by the trial court on March 9, 1982 to 15 years in the custody of attorney general, sentences to run concurrent on all counts, and $25,000.00 fine. (R-128). The petitioners filed their Notice of Appeal on March 12, 1982. The Appellate Court affirmed their convictions on Count 3 and vacated the convictions in counts 4, 5, and 9, without reviewing them, on April 4, 1983.

STATEMENT OF FACTS

Following is a statement of the evidence presented by the government to support conviction on Count 3, possession to distribute cocaine. It is a statement of all relevant evidence and presented in a light most favorable to the government.

The only witness to testify at trial concerning cocaine related activities was Ricky Bowman, a stepson of co-defendant Benito Montemayor. At the close of his testimony on the first day, the trial court stated that the government had not shown that Manuel and Meynardo Montemayor were involved in the charged conspiracies. (T-85, 136-142). The following day the government recalled Ricky Bowman and queried into the same areas it had the day before. Even though the trial court did not believe there was sufficient evidence to find participation in the charged conspiracies, it allowed hearsay testimony of the co-defendants into evidence. Bowman's testimony changed considerably on the second day. Bowman testified that shortly after his discharge from the army in 1976, he and co-defendants Benito Montemayor and Salvador Flores packaged marijuana and cocaine and counted large sums of money in a bedroom of a trailer owned by Benito Montemayor. (T-88). The drug related activities took place in a suburb of Chicago, Illinois. Defendants-Appellants, Manuel and Meynardo Montemayor were never present nor connected in any way with the packaging of alleged drugs or counting of money. (T-184, 185). Neither was there any testimony illicited to show that the substances packaged were in fact marijuana and cocaine. (T-185). Bowman further testified he never saw Manuel Montemayor in Chicago, Illinois, he

met him for the first time in 1977, and never had any drug deals with him.

The testimony concerning cocaine shifted from Chicago, Illinois (1976) to Monterrey, Mexico (1977), to McAllen, Texas (1979). In the fall of 1979, witness Bowman visited with his stepfather, Benito Montemayor at his house in McAllen, Texas. While there he saw all the co-defendants snorting cocaine. (T-120, 122). After one of the cocaine parties, Benito Montemayor asked the witness to help load a Chevrolet Blazer with brown packages that were wrapped in tape and in a basket. (T-174). Bowman did not know what was in the packages, money or cocaine, and did not help load the Blazer. (T-219, 269). The appellants were merely visitors to the home of Benito Montemayor and were not shown to have any connection to the Blazer. There was no testimony linking Meynardo or Manuel Montemayor to any cocaine related activity other than for personal use. (T-177, 184, 219). The witness alluded to the packaging of cocaine on a pool table in a guest house, but stated he did not see it packaged. (T-181).

Witness Bowman further testified that his stepfather, Benito Montemayor and mother, moved to Monterrey, Mexico in late summer, 1977. He lived with his parents for several months and while there helped Benito Montemayor load and unload a Blazer with drugs and money, and counted large sums of money. (T-92, 93). No testimony indicated that Manuel and Meynardo Montemayor aided in any way the loading or unloading of the Blazer, or were they connected in any way with cocaine. Bowman could not remember if Meynardo Montemayor was present once when a large sum of money was counted. (T-93).

Once again, no evidence was introduced to show what was inside the wrapped packages, nor how the witness knew the contents were controlled substances, i.e., cocaine, heroin, or marijuana. In fact, the witness testified he did not know what was inside the packages, drugs or money. (T-217). While in Monterrey, witness Bowman testified, the petitioners and their brothers met at a brothel and discussed cocaine deals. Bowman did not testify to any specific cocaine deals or specific conversations concerning cocaine deals; he just mentioned cocaine deals in general.

Edwin Albers, a chemist, testified to vacuuming a pool table cover at the home of Benito Montemayor and also vacuuming the rear taillight section of a Chevrolet Blazer owned by Benito Montemayor more than two years after the substance was alleged to be present. He performed tests on the substances recovered from the pool table and Blazer and testified that he found a trace of cocaine present in each substance analyzed. (T-315). After analysis nothing was left for an independent analysis by petitioners.

REASONS FOR GRANTING THE WRIT

I.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT CONSPIRACY CONVICTIONS AS CHARGED IN COUNT III OF THE INDICTMENT AND THE JUDGMENT WAS CONTRARY TO FUNDAMENTAL FAIRNESS AND DUE PROCESS.

The issue for this court is whether or not it will allow convictions obtained without fundamental fairness and due process of law, to stand.

The Constitution of the United States Amendment V provides in pertinent part: No person shall . . . be deprived of life, liberty or property, without due process of law . . . Petitioners urge that they have been totally deprived due process of law—their rights to fundamental fairness totally forsaken. It appears the defendant charged with extensive drug violations falls into a separate class of citizen who is not entitled to fundamental fairness and due process of law and all that need to be shown for a conviction is an indictment. Upon appeal, review courts are reluctant to give serious considerations to an argument based on sufficiency of the evidence, for the reviewing court is asked to reverse findings of fact made by a jury or trial court.

Petitioners do not urge the court to consider any controverted evidence, but to take only the evidence presented by the government during its case in chief and view it in a light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

First, this is a "no drug" case. The record is void of any cocaine being introduced into evidence or any competent

evidence that cocaine was ever in the actual or constructive possession of either appellant. The government's testimony from chemist, Edwin Albers, notwithstanding, the government did not introduce one milligram of cocaine into evidence, nor did they show by competent evidence that one milligram of cocaine was ever possessed by either petitioner. Conceded, this is a conspiracy charge and the government does not have to prove actual possession by a defendant or physical evidence of the presence of a drug. However, in the instant case, in light of the petition for writ of certiorari, the failure to show possessive cocaine is important.

Chemist, Albers, testified that he vacuumed a pool table and a Chevrolet Blazer more than two years after a substance (cocaine) was allegedly present and recovered a trace from each so small that it could not be measured; not even one milligram. After analyzing the substance and discerning traces, he testified that the substances were destroyed. No fact finder should be allowed under the reasonable man standard to infer that a suspect trace of cocaine recovered two years, after an alleged event, from a pool table cover and a Blazer, in the exclusive possession and control of another is evidence of a conspiracy to distribute cocaine.

Next to be considered are the statements or actions of either petitioner which would show willing participation in a conspiracy to distribute cocaine. This court is well advised in the premise that "mere association or presence is not sufficient to show participation." *United States v. Littrell*, 594 F.2d 828 (5th Cir. 1978). In order for a conviction to stand, there must be evidence that each individual appellant had knowledge of a conspiracy and then voluntarily joined that conspiracy. *United States v. Marable*, 574 F.2d 224 (5th Cir. 1978).

A review of the record requires one to ask what was the extent, terms and conditions of the conspiracy to distribute cocaine, and what did either appellant do to further it. One must also look to what the appellants said to inculpate themselves.

The record reveals that the only conversation either petitioner participated in was a general conversation about "drugs". Testimony indicated that both petitioners sniffed cocaine from a pool table cover, but that is not a violation of the statute charged. Testimony also indicated that the petitioners were present when "packages" were loaded and unloaded from the Blazer and when "packages" were on a pool table, however, the witness did not know what was inside of those "packages". (T-181).

The record is void of competent evidence to prove what was in those packages. For the convictions to stand, competent evidence must show that cocaine was in the packages that allegedly were on the pool table and loaded into the Blazer in McAllen, Texas. The mythical, reasonable man, bent on preserving due process of law could not conclude that cocaine was in the subject packages. The only witness to testify, Ricky Bowman, stated he did not know what was in the packages, drugs or money. (T-219, 269).

The threshold question the trial court must consider is whether or not the existence of a conspiracy was established. Conspiracy in its broadest definition is "a partnership in criminal purpose." *United States v. Kissel*, 218 U.S. 601, 608, 31 S.Ct. 124, 126, 54 L.Ed. 1168 (1910).

The sufficiency of the evidence in every conspiracy prosecution requires close scrutiny. As Mr. Justice Jackson noted in *Krulewitch v. United States*, 336 U.S. 440, 449, 69 S.Ct. 716, 721, 93 L.Ed. 790 (1949) (concurring

opinion), "The looseness and pliability of the (conspiracy) doctrine present inherent dangers which should be in the background of judicial thought whenever it is sought to extend the doctrine to meet the exigencies of a particular case." One of the major factors contributing to these dangers is the fact that the conspiracy charge has become the "darling of the modern prosecutor's nursery" and that the defendants charged with such a crime can easily be convicted even if innocent. See *Harrison v. United States*, 7 F.2d 259, 263 (2nd Cir. 1925) (L. Hand, J.). Thus, a reviewing court must make an independent evaluation of the record to determine, first, whether sufficient evidence was presented for a jury to conclude beyond a reasonable doubt that a conspiracy existed and, second, whether sufficient evidence was presented for a jury to conclude beyond a reasonable doubt that the defendants were involved.

To prove a conspiracy exists the government does not have to prove evidence of a formal agreement but may rely upon circumstantial evidence of concert of action among the defendants. *United States v. Flakman*, 495 F.2d 344 (7th Cir. 1974) *cert. denied*, 95 S.Ct. 512. *United States v. Warner*, 441 F.2d 821 (5th Cir. 1971). Courts have been consistent in emphasizing that the agreement is the most important aspect of the conspiracy doctrine because it is the basis for changing both the inchoate crime and the substantive offense. *United States v. Falcone*, 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128 (1940).

Proof of the illegal agreement or a common purpose may rest upon either direct evidence or upon inferences drawn from relevant and competent circumstantial evidence. *United States v. Warner*, 441 F.2d 821 (5th Cir. 1971) *cert. denied*, 404 U.S. 829. Such proof does not

require allegation of proof of an overt act. *United States v. Rodriguez*, 612 F.2d 906 (5th Cir. 1980).

In *Rodriguez*, the court cited numerous decisions including *United States v. Bates*, 600 F.2d 505 (5th Cir. 1979), *United States v. Mitchel*, 588 F.2d 986 (5th Cir. 1979), *United States v. Palacios*, 556 F.2d 1359 (5th Cir. 1977) and held in conspiracies charged under 21 U.S.C., Sec. 846 and 963 that:

> "We recognize some confusion in the circuit as to whether an indictment charging a conspiracy to violate the Drug Control Act must set out and the government must prove at least one overt act . . . , we now expressly hold that these indictments do not require allegation or proof of an overt act."

A fact finder is allowed to draw a reasonable inference, but not a conclusion based upon suspicion. Witness Bowman did not testify that the packages contained a powdery substance, or a containerized liquid substance. (3R-219, 269).

The statements of each appellant must be examined to determine what they said to show wilful participation in a conspiracy. The appellant, Manuel Montemayor did not make one statement to show participation in the conspiracy. He was allegedly present in Monterrey in 1977 on several occasions in a brothel when drug deals were allegedly discussed. The conversations in the brothel were also the only evidence the government presented to prove Meynardo Montemayor was involved in the conspiracy. If a fact finder were allowed to infer that the conversations were about cocaine, then what were the terms and goals of the conspiracy. Conversations about drugs in a brothel in Mexico is not a violation of the statute charged in the indictment. (T-149-150).

The record is void of any act or any statement from which it may reasonably be inferred that the appellants were willing participants in a conspiracy.

Fundamental fairness, due process, and all that our criminal justice system stands for militates against a conspiracy conviction based on the foregoing evidence. Mere association by blood is not sufficient for conviction. There must be evidence that the appellants entered into an agreement to further the conspiracy to distribute cocaine in the Southern District of Texas.

II.

THE COURT ERRED WHEN IT ALLOWED CO-DEFENDANT HEARSAY STATEMENTS INTO EVIDENCE.

Pursuant to Rule 104 of the Federal Rules of Evidence, the trial judge alone decides preliminary questions as to the competence of evidence, and the jury decides preliminary questions as to the conditional relevancy of the evidence.

Rule 104 provides:

> (a) Questions of Admissibility Generally.
>
> Preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> (b) Relevancy Conditioned on Fact.
>
> When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing on Jury.

Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or, when an accused be a witness, if he so requests.

In *United States v. James*, 590 F.2d 575 (5th Cir. 1979), the Fifth Circuit Court of Appeals recognized the inherent dangers of permitting the jury to hear co-conspirators' statements during the trial, subject to a subsequent motion to strike, without first determining their admissibility. The court stated:

> "Such evidence endangers the integrity of the trial because the relevancy and apparent probative value of the statements may be so highly prejudicial as to color other evidence even in the mind of a conscientious juror despite instructions to disregard the statements or to consider them conditionally. As a result, such statements should be evaluated by the trained legal mind of the trial judge . . .
>
> "Because the Rule 104(b) exception is inappropriate to test the admissibility of such declarations, we hold that of the admissibility of the evidence. The jury is to play no role in determining the admissibility of the statements." (*United States v. James, supra*, at 579-580)

The court then established a procedure requiring government to establish a *prima facie* case of the existence of a conspiracy in a pretrial hearing *outside the presence of the jury*. This procedure may be summarized as follows:

1. The trial court, without jury participation in any manner, must determine the admissibility of the alleged co-conspirator's declaration.

2. A co-conspirator's declaration may be admitted into evidence only if the prosecution makes a "sufficient showing, by independent evidence, of a

conspiracy among one or more of the defendants and the declarant and . . . that the declarations at issue were in furtherance of that conspiracy, "which showing must be made "as a preliminary matter, . . . (by) substantial, independent evidence of a conspiracy at least enough to take the question to the jury." (590 F.2d at 581).

3. Fulfillment of the question of admissibility must be established by evidence independent of the co-conspiracy's statement itself.

4. The District Court should "whenever reasonably practicable, require the showing of a conspiracy and of the connection of the defendant with it before admitting declarations of a co-conspirator. . . ." (590 F.2d at 582).

In *United States v. Grassi*, 616 F.2d 1295 (5th Cir. 1980), the court clarified the *James* procedure as follows:

> "Evidence submitted at a *James* hearing for the purpose of proving a conspiracy must, of course, be free from hearsay objection; otherwise, a co-conspirator's hearsay might bootstrap itself into admissible evidence. Moreover, in order to protect the defendant from the admission of prejudicial hearsay on the basis of threadbare evidence of conspiracy, the judge must decide at the conclusion of the *James* hearing whether the independent evidence linking the defendant to the conspiracy is substantial. 590 F.2d at 580-81."

At the beginning of the second day of trial the court found no evidence existed to establish that either appellant was part of the conspiracy. The court stated as follows at (T-136):

> "But unless the government can show me precisely what evidence there is against Manuel and Meynardo Montemayor maybe I have overlooked something. I don't think it has been adequately established that they are involved in this conspiracy. The only evi-

> dence that I recall is that they were present at the home in McAllen, Texas, and may have participated in the use of cocaine, personal use of cocaine. But using cocaine and being involved in a conspiracy to distribute it are entirely two different things."

The trial court then asked the Assistant United States Attorney if any other evidence existed to involve the appellants in the alleged conspiracies. Assistant United States Attorney, Smith, replied at (T-137):

> "We don't feel on that strong a ground as we received the evidence and *are not in the position that we want to elicit more testimony from the witness to establish their entrance into the conspiracies of Meymardo and Manuel* to satisfy the *James* threshold."

After the court stated that the evidence was insufficient to link appellants to the charged conspiracies, and after the government attorney stated he did not want to elicit further testimony to involve the petitioners in the conspiracies, without an offer of proof or hearing, the court allowed the government to re-examine Bowman and admitted into evidence hearsay statements of co-defendants. The hearsay statements by co-defendants were an integral part of extraneous drug related activities, and evidence of such should not have been allowed into evidence without showing the defendants were first, in fact, co-conspirators. Without the evidence of extraneous drug transactions by Benito, Matias, and Reyes Montemayor, the record would have been void of evidence of a viable drug conspiracy, let alone evidence of the petitioners involvement in one.

III.

THE PETITIONERS' RIGHT TO FUNDAMENTAL FAIRNESS AND DUE PROCESS WERE VIOLATED WHEN THE COURT DENIED THEIR MOTIONS TO DISMISS INDICTMENT DUE TO VAGUENESS AND WHEN IT DENIED APPELLANTS' MOTIONS FOR BILL OF PARTICULARS AND OTHER PERTINENT DISCOVERY.

Rule 7(c) of the Federal Rules of Criminal Procedure states that an indictment shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged by the government. Each count of the indictment must fulfill the basic principles of due process. An inquiry as to the sufficiency of the indictment focuses on whether it provides substantial safeguards to all criminal defendants. *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962).

An indictment is sufficient if it at first, contains the elements of the offense charged and fairly informs a defendant of the charge which he must defend, and second enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Hagner v. United States*, 285 U.S. 427, 52 S.Ct. 417, 76 L.Ed. 861 (1932). *United States v. Debrow*, 346 U.S. 374, 74 S.Ct. 113, set forth the offense in the words of the statute itself, as long as "those words themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." *United States v. Carll*, 105 U.S. 611, 26 L.Ed. 1135 (1882). "Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such statement of facts and circumstances as will inform the accused of the specific offense, coming under general description, with which he is charged." *United States v. Hess*, 124 U.S. 483, 8 S.Ct. 571, 31 L.Ed. 516 (1888).

The indictment in the instant case was ambiguous and did not sufficiently apprise the petitioners of the charges contained therein because it charged a conspiracy of long duration (1970-present), many co-conspirators, and a brief one paragraph statement of the charge with no overt acts described. Admittedly, no overt act need be alleged to bring a conspiracy charge under 21 U.S.C. 846 or 963. *United States v. Rodriguez*, 612 F.2d 906, 919 (5th Cir. 1980), *aff'd on other grounds*, 450 U.S. 333 (1981). The conspiracy charge under the above statutes thus becomes one of the easiest criminal charges for the government to plead and prove, and the chance that an innocent person could be wrongfully convicted under such broad statutes requires broad discovery rights concerning the charges.

The simplified burden of proof required to gain a conspiracy conviction was compounded by the trial court's denial of petitioners' request for a Bill of Particulars and Grand Jury testimony. Not only were the Appellants denied discovery necessary for its defense of this case, they were also denied Grand Jury testimony that could have been used for impeachment at trial.

The case of *United States v. Cecil*, 608 F.2d 1294 (9th Cir. 1979), is directly on point with the fact situation in this case. As the *Cecil* court states at 608 F.2d 1294, 1296:

> "The present indictment is a rather barren document. Aside from tracing the language of the pertinent statutes in setting out the elements of the offenses with which the defendants were charged the indictment makes only two specific allegations concerning the conspiracies. It states that the conspiracies occurred in Arizona, Mexico, and elsewhere and offers the names of some of the alleged co-conspirators. The indictment fails to state any other facts or circumstances pertaining to the conspiracy or any overt acts done in furtherance thereof. More importantly, the indictment fails to place the con-

spiracies within any time frame. The language 'beginning on or before July, 1975, and continuing thereafter until on or after October, 1975" is open-ended in both directions.

In view of these deficiencies, we find that the indictment fails to allege sufficient facts to facilitate the proper preparation of a defense and to ensure that the defendants were prosecuted on facts presented to the grand jury. This indictment clearly lacked a statement of the facts and circumstances that would inform the accused of the specific offenses with which they were charged. See *Hamling v. United States*, 418 U.S. at 117-18, 94 S.Ct. 2887. In addition, the sufficiency of this indictment raises a problem described recently by another panel of this Court:

> To allow a prosecutor or a court to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection that the grand jury was designed to secure, because a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to the grand jury that indicted him. (cites omitted)"

The appellants made a motion for disclosure of Grand Jury transcript based on the United States Supreme Court ruling in *Dennis, infra*. In *Dennis*, the court stated that "after the Grand Jury's functions are ended, disclosure is wholly proper where the ends of justice require it." *Id.* at 984.

In *Hickman v. Taylor*, the Court stated that the release of Grand Jury transcripts "makes a trial less than a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practical extent." 329 U.S. at 501. Additionally, the Supreme Court in *United States v. Dennis*, 384 U.S. 855, 868 (1966), referred to "the growing realization that disclosure, rather

than suppression of relevant materials ordinarily promotes the proper administration of criminal justice."

It should be noted that a motion for a bill of particulars cannot save an invalid indictment. *United States v. Nance*, 174 U.S. App. D.C. 472, 474, 533 F.2d 699, 701 (D.C. Cir. 1976). *Keith, supra, Russell supra.* These cases found that an incomplete indictment would allow both prosecutors and the court to make subsequent guesses as to what was in the minds of the grand jury at the time they returned the indictment. This would deprive the defendant of a basic protection that the grand jury was designed to secure, because a defendant could then be convicted on the basis of facts not found by and perhaps not even presented to the grand jury that indicted him. The trial court denied petitioners' motions for a bill of particulars (T-9) and further refused petitioners access to the grand jury transcript. The petitioners only had knowledge that the government alleged they conspired with a large number of individuals over a period spanning 11 years (1970-present).

This was substantial denial of the petitioners' due process rights. The government's proof at trial did not conform to the indictment in that no evidence was presented showing any drug transactions from the period 1970-1975. Further, the appellee presented no evidence that either petitioner had anything to do with cocaine until the year 1979, and then both used the drug for personal consumption. The appellee presented no evidence that either petitioner ever packaged, transported, sold, or distributed any cocaine at any time or that they agreed or planned to do any of the above activities.

The sufficiency of the indictment in this case coupled with the trial court's denial of access to the grand jury transcript and denial of petitioners' motion for a bill of

particulars clearly prejudiced the petitioners, for they had no assurance that they were prosecuted on the basis of facts presented to a grand jury. They were denied the chance to prepare a defense and further could not determine the sufficiency of the charges against them.

IV.

THE TRIAL COURT ERRED WHEN IT ALLOWED A GOVERNMENT CHEMIST TO TESTIFY THAT HE FOUND TRACES OF COCAINE IN A CHEVROLET BLAZER OWNED BY BENITO MONTEMAYOR AND ON A POOL TABLE COVER LOCATED IN THE HOME OF BENITO MONTEMAYOR.

Rule 16(a)(1)(c) of the Federal Rules of Criminal Procedure provides that a defendant shall be allowed to inspect and copy any tangible evidence in the possession of the government which is material to the preparation of a defense and are intended for use by the government in its case in chief at trial.

Both inspection and independent analysis of suspected narcotics may be allowed upon showing that proposed discovery is reasonable and might be material to the defendant's case. *United States v. Pollack*, 402 F.Supp. 1310 (D.C. Mass. 1975).

A chemist, Edwin Albers, testified for the government that he vacuumed a pool table cover in the home of Benito Montemayor on October 4, 1981 and analyzed the sweepings. The witness testified he found traces of cocaine in the substance analyzed. Ricky Bowman testified that cocaine parties occurred around the pool table in the fall of 1979, two years before the pool table was vacuumed and the trace of cocaine was recovered.

The government informed the petitioners one week before trial of the intent to use the chemist's testing at

trial. The petitioners requested that the government produce the vacuumed substance so an analysis could be made, but the government refused on the basis that the substance was used up. The petitioners filed a Motion in Limine requesting the trial court to bar the chemist's testimony on the grounds they were not given sufficient notice of the intended use of the scientific testimony and due to the failure of the government to provide a sample of sweepings for independent analysis. (T-315). The trial court denied the Motion in Limine.

On the day before chemist Edwin Albers was to testify, the petitioners were notified that Albers was to testify that he vacuumed a taillight assembly of Benito Montemayor's Blazer on November 19, 1981, and made an analysis of the sweepings. He testified he found a trace of cocaine present. Petitioners filed a Motion in Limine and requested the trial court to bar the chemist's testimony on the basis of insufficient notice of scientific evidence and failure to provide a sample of that evidence for analysis. This motion was denied.

Case law provides an exception to Rule 16 if prejudice results from the failure to provide the requested substance for an independent laboratory analysis. In *United States v. Gordon*, 580 F.2d 827 (5th Cir. 1978) a narcotic substance was destroyed by the government prior to its expert testifying at trial. The court allowed the expert's testimony in *Gordon* because it found that defendants were provided with samples of the chemicals the government used in its test. A later Fifth Circuit case, *United States v. Gaultney*, 606 F.2d 540 (5th Cir. 1979), found no prejudice resulted from the fact that defendant was not provided with a primary reference sample of an alleged narcotic for use in independent laboratory analysis. The court found that the defendant stipulated that the test

was to be conducted at a certain laboratory and then failed to follow through with said test claiming defendants' experts could not comply with the laboratory's procedures.

No such exception can be found in this case. In fact greater prejudice occurred in this case than in the case law presented because the government did not produce the scientific reports of the chemist until after he testified. (T-319). Appellants were left without the means to effectively cross-examine the chemist as to the accuracy and sufficiency of his testing. The government has argued petitioners were not prejudiced by the introduction of the evidence at trial because the appellants could have vacuumed the surface of the pool table and taillight assembly of the Chevy Blazer and conducted their own tests. This would have been futile since both the pool table and Blazer were cleanly vacuumed of any evidence. All the efforts of chemists to recover evidence of a presence of a narcotic drug on the subject pool table or in the subject Blazer produced only a trace of cocaine from each place. And strangely, the trace recovered was too small to measure by an accepted standard of measurement.

The overwhelming prejudice that resulted from the admission of the testimony of the chemist concerning traces of cocaine is highlighted when a review of the record clearly indicates that the only evidence of drugs around the appellants throughout the entire trial is the evidence concerning the phantom traces of cocaine. The appellants were irreparably prejudiced by the admission of this aforementioned evidence when one considers that the recovery of the traces of cocaine were made more than two years after any cocaine was alleged to have been placed on the pool table or in the Blazer.

Had the appellants been given adequate notice of vacuuming of the pool table and Blazer and the scientific test to produce traces of cocaine, they would have been able to present several references to both possessory interests in the pool table and Blazer and to the preposterous result of a chemical test where the amount of narcotic discovery is so small that no standard of measurement could be placed on it.

Contrary to appellee's argument (Br. 31), a reversal is an irrefutable matter of law, fundamental fairness and common sense. When the admission of evidence concerning traces of cocaine is weighed against the following factors, the great prejudice that resulted to the appellants is clearly evident:

(1) Recovery of an amount of cocaine too small to measure by any standard of measurement, but testimony received characterizing the amount recovered as a trace;

(2) The subject pool table and Chevy Blazer in the exclusive possession and control of persons other than the petitioners;

(3) Inadequate notice of the intended use by the appellee of results of scientific tests, and failure to provide a chemist's report until after he testified;

(4) Presence of cocaine on the pool table and in the fender well of the Blazer van two years prior to the vacuumings;

(5) The evidence of traces of cocaine was the only evidence admitted during the trial concerning the actual physical presence of a narcotic substance.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX 1

UNITED STATES of America,
Plaintiff-Appellee,

v.

Meynardo MONTEMAYOR and Manuel Montemayor, Defendants-Appellants.

No. 82-2129.

United States Court of Appeals,
Fifth Circuit.

April 4, 1983.

Appeals from the United States District Court for the Southern District of Texas.

Before JOHNSON, WILLIAMS and JOLLY, Circuit Judges.

JOHNSON, Circuit Judge:

On November 17, 1981, a sixteen-count indictment was filed which charged eight different individuals with various narcotics offenses. Eleven of the sixteen counts were applicable to defendants Manuel and Meynardo Montemayor. Seven of the eleven counts charged substantive offenses. The remaining four counts charged defendants with conspiracy offenses. Count 3 charged defendants with conspiracy to distribute cocaine; Count 4, with conspiracy to distribute heroin; Count 5, with conspiracy to distribute marihuana. Each of these offenses was in violation of 21 U.S.C. §§ 841(a)(1) and 846. Count 9 charged defendants with conspiracy to manufacture and distribute heroin, knowing it would be imported into the United States, in violation of 21 U.S.C. §§ 959 and 963.

On January 26, 1982, a jury trial commenced with three of the eight named defendants on trial.[1] On January 28, at the close of the evidence, the district court dismissed the substantive counts. On February 1, the jury returned a verdict of guilty on each of the four conspiracy counts. After a poll of the jury revealed that one juror did not agree with the guilty verdict against co-defendant Alifonso Arredondo, the court granted a mistrial as to Arredondo.

Defendants Manuel and Meynardo Montemayor appeal their conviction on the four conspiracy counts. They claim that (1) the evidence was insufficient to convict them on any of the four counts, (2) the district court erred in admitting coconspirator hearsay statements, (3) the district court erred in denying defendants' motion to dismiss the indictment for vagueness and motions for a bill of particulars and for disclosure of the grand jury transcript, (4) the district court abused its discretion in admitting scientific evidence showing cocaine residue on items used by the conspirators, and (5) the district court erred in polling the jury separately as to each of the three defendants to determine if the guilty verdicts returned were unanimous. We find no merit in defendants' last four contentions and we find the evidence sufficient to sustain the conviction for conspiracy to distribute cocaine. We therefore affirm the conviction on Count 3 for conspiracy to distribute cocaine and vacate the convictions on the other three conspiracy counts.

I. *Facts*

Construed most favorably to the prosecution, the record reflects support for the following version of events. In

[1] Two named defendants, Benito and Reyes Montemayor had fugitated before the trial began. Matias Montemayor was allowed to sever his case and was tried separately. Both Salvador Flores and Eufracio Garcia pleaded guilty prior to trial.

1975, Benito Montemayor's stepson, Ricky Lee Bowman,[2] who was on leave from the military, helped his stepfather and Salvador Flores count large sums of money and weigh package marihuana in Benito's trailer in Chicago, Illinois. Both Bowman and Flores went to Mississippi to have boxes welded underneath a 1972 Dodge van in order to transport the marihuana. Benito returned to Chicago by plane and Flores took the van to Texas. Flores brought the van back to Chicago loaded with marihuana which Bowman helped him unload and take into Benito's house. After Bowman's undesirable discharge from the Army in March 1976, Bowman, along with his mother Eva, and Flores, assisted Benito in packaging marihuana and cocaine and in counting large sums of money—roughly amounts of $20,000 to $30,000 per person—three or four times a week.[3] Bowman testified that in 1976 he helped Benito package marihuana about fifteen to twenty times and helped package cocaine about five to seven times; he testified that pursuant to Benito's instructions he helped unload cocaine and marihuana from the Dodge van in Chicago on fifteen to twenty occasions. Bowman also testified that the cocaine and marihuana came from somewhere in Mexico and that Flores who drove the van, told him that he, Flores, always crossed the border at Laredo.

Drug Enforcement Administration (DEA) Agent Frank Tucci, working in an undercover capacity, purchased one pound of heroin from Flores in March 1976 in Chicago. Agent Tucci later spoke over the phone to a man who identified himself only as Flores' boss about both the purchase of the one pound of heroin and additional purchases of heroin. The boss told Agent Tucci that he "operated big" and could swing "six, seven, eight" as many as Tucci wanted, "in a day." Agent Tucci later spoke to Benito in person at his trailer and recognized his

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[2] The Government's case consisted primarily of Bowman's testimony.

[3] At this time the trailer was in Des Plaines, Illinois.

voice as the voice of the person who had identified himself on the phone as Flores' boss.

Defendant Meynardo entered the picture in the summer of 1977 in Chicago where he took part in a conversation about heroin with his brothers Benito, Matias, and Reyes. At that time Bowman heard Meynardo and Reyes agree with Matias to go to Detroit to "take care of the deal"—to pick up thirty-two kilos of heroin.

Around August or September 1977, Benito, along with his wife and children, moved to a house in Monterrey, Mexico. Bowman testified that in the fall of 1977 there were at least five meetings in a brothel in that city. Defendants Manuel and Meynardo were both present at all of those meetings along with three of their brothers—Benito, Matias, and Reyes—and Bowman. The topic of discussion at these meetings was multikilogram cocaine and heroin deals in Detroit. Bowman testified that there was a period when Matias, who was the lead brother, had to get the approval of all of his brothers before a cocaine deal could be approved or in their parlance, could "go down." Bowman's testimony was that all the brothers agreed that a particular cocaine deal was a "good deal" and that Meynardo, Manuel and the other brothers gave their approval to various transactions. Also during the fall of 1977, after the move to Monterrey, Bowman helped load and unload large amounts of money and drugs concealed behind the taillights and fender wells of a Chevrolet Blazer. Bowman testified that defendant Meynardo, along with Benito, Matias, Reyes, and a banker, was present on one occasion when Bowman helped count $500,000. Bowman was unable to recall whether Meynardo had helped count the money. The only time Bowman took the Blazer out it was loaded with cocaine and he took it to Huero Macias[4] house in Cerralvo, Mexico.

On another occasion in the fall of 1977, Bowman went to Meynardo's house in Laredo where Bowman heard

[4] Macias was a handyman who was known as "the chemist."

Benito and Maynardo talking about a load of marihuana that had not arrived. Meynardo protested to Benito that "it wasn't his fault."

Another event in the fall of 1977 was a birthday celebration for Matias near Cerralvo.[5] Among the guests were defendants Manuel and Maynardo, Bowman, Reyes, Matias, Benito, Robie (a sixth brother), Matias' bodyguards, workhands, a band, and some women from the brothel. Defendants Manuel and Meynardo, Bowman, Benito, Matias, Reyes, and Macias (the chemist) took a twenty-minute walk into the woods until they arrived at a cave which Benito called their "heroin lab." Everyone, including defendants Manuel and Meynardo, went inside the cave where two workhands were using wooden paddles to stir heroin in two large vats over a fire. The hands were skimming a brown substance off the top of the heroin and throwing it in piles on the ground. After observing for ten to twenty minutes, everyone except the two workhands went back to the ranch. When Bowman returned to Monterrey, he was instructed to clean the brown skim off both his own boots and Benito's. What Bowman finally had to do was to burn Benito's boots, which were badly corroded on the bottom, and all of their clothes.

Other heroin transactions took place in Chicago during this same period of time until about February 1978. These involved ten to eleven sales of pounds of heroin on credit by Reyes to Carlos Gutierrez, who at the time of trial was incarcerated in Chicago. On the occasion of one of these sales, Benito and Matias were also present and Reyes obtained Matias' approval before selling Gutierrez an additional pound. On another occasion when they were "sniffing" cocaine, Reyes told Guiterrez that his (Reyes') brothers were bringing cocaine to Chicago, although Reyes did not name the brothers.

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[5] There were two ranches in Cerralvo, one occupied by Matias and the other by Benito. Reyes also had a warehouse or farm near Cerralvo.

In the fall of 1979, there were several drug-related meetings and get togethers in the guesthouse behind Benito's house in McAllen, Texas. Defendants Manuel and Meynardo attended these meetings and parties which occurred during a three-week period when Bowman stayed at the guesthouse. Although Bowman did not actually see the weighing and packaging, he stated that defendants Manuel and Meynardo, along with Benito, Matias, and Pancho, weighed and packaged cocaine on the pool table at the parties. Pursuant to Benito's instructions, Bowman cleaned the pool table with a brush after each such party. After one of the parties in the guesthouse, defendants Manuel and Meynardo, Benito and Matias, among others, were standing outside around the Chevrolet Blazer and a basket of cocaine.[6] Bowman refused to follow Benito's instructions to take a screwdriver and help Pancho load the fender wells of the Blazer. As Bowman left to go back to the house, he observed Pancho prepare to take the fender wells off. When Bowman later returned, the Blazer and people were gone. Subsequent to this occasion, defendants Manuel and Meynardo were present at another gathering which involved loading the Blazer and which culminated in a "coke-snorting" party in the guesthouse. Still another meeting in McAllen took place in the master bedroom of Benito's house rather than the guesthouse. Defendants Manuel and Meynardo, as well as Matias and Pancho, entered Benito's bedroom carrying duffle-type shoulder bags, locked the door, and emerged after two hours with the bags.

Finally, it was brought out at trial that Meynardo had amassed a wealth disproportionate to his legitimate employment: he had put $125,000 cash down payment on a house in Laredo; he ran a used car lot in (Nuevo) Laredo, Mexico; he was a part owner in a Mexican cor-

[6] Although at one point in his testimony Bowman stated that the basket contained brown paper packages filled with money or drugs, he later identified it as a "basket of cocaine."

poration; he also had a grocery store which was ultimately sold at a sheriff's auction in Chicago.

II. *Sufficiency of the Evidence*

Defendants first contend that the evidence was insufficient to support a conviction on any of the four conspiracy counts. Both the Government and defendants agree that the concurrent sentence doctrine is applicable to this case. Under that doctrine, the existence of one valid conviction may make unnecessary the review of other convictions when concurrent sentences have been given. *United States v. Rubin*, 591 F.2d 278, 280 (5th Cir.), *cert. denied*, 444 U.S. 864, 100 S.Ct. 133, 62 L.Ed.2d 87 (1979). The predicate to the application of the concurrent sentence doctrine is the existence of concurrent sentences.[7] Although, for the purpose of sentencing, the trial judge consolidated the four conspiracy counts into one count, this Court is confident that the judge intended to impose concurrent sentences. Indeed, at the sentencing hearing the judge stated:

> The jury found each of you Defendants guilty on these counts and I think that the evidence is

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[7] The defendants have not argued that the concurrent sentence doctrine is inapplicable to the instant case. Indeed, in their reply brief they state: "At sentencing the trial court did not mean to imply that only one conspiracy existed, but to the contrary that he intended to consolidate the four counts so that the sentence of each could run concurrently. *United States v. Gray*, 626 F.2d 494, 501-02 (5th Cir. 1979)" (declining to review the defendant's importation and conspiracy to import convictions for sufficiency of the evidence by invoking the concurrent sentence doctrine), *cert. denied*, 449 U.S. 1038, 101 S.Ct. 616, 66 L.Ed.2d 500 (1980), 449 U.S. 1091, 101 S.Ct. 887, 66 L.Ed.2d 820, 450 U.S. 919, 101 S.Ct. 1367, 67 L.Ed.2d 346 (1981). An appellate court will not consider *sua sponte* an argument not raised in the court below or urged by the litigants except to prevent a miscarriage of justice. *Hormel v. Helvering*, 312 U.S. 552, 61 S.Ct. 719, 721, 85 L.Ed. 1037 (1941); *McKissick v. United States*, 379 F.2d 754, 759 (5th Cir. 1967); 28 U.S.C. § 2106; Fed.R.Civ.P. 52(a).

> wholesome and adequate to support that verdict if they accepted the government's evidence as they obviously did. And I think that when you take into account all the evidence and not isolate it, but just take all the circumstances, I feel that the evidence is sufficient to support these various findings on these various counts. . . . I am satisfied that the way the matter was submitted to the jury, that the jury had factual evidence before it to make the findings it did beyond a reasonable doubt on each of the conspiracy counts as it was submitted because it was a multicount indictment.
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> * * * * * *
>
> And I am going to sentence you on Counts 3, 4 and 5 and 9, each of the Defendants, that they be placed in the custody of the Attorney General for a period of fifteen years. I am going to sentence a fine of $25,000.00, a fine of $25,000.00 against each of the Defendants.* The effect of this is that your sentence is on these counts.
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> * * * * * *
>
> [A]s I understand the law, that is my punishment and the effect of it is that the sentences will, in effect *be concurrent* as matters now stand in my understanding of the law.

(emphasis added).

The judge further stated that if he thought there were multiple conspiracies he would assess a more severe sentence: "I feel there is just one conspiracy. If I did not feel that way, I would assess a more severe sentence against you gentlemen. . . . If I am wrong in that, then

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* 21 U.S.C. § 841(b)(1)(A) permits a maximum of 15 years imprisonment and $25,000 fine for violations of §§ 841(a)(1) and 846. Similarly, 21 U.S.C. §§ 960(a)(3) and 960(b)(1) allow a maximum of 15 years in prison and $25,000 fine for a violation of §§ 959 and 963.

you are very fortunate because if I—I would certainly consider some consecutive sentences in these cases had the law permitted it." It is apparent that the judge consolidated the four counts because of a concern over the single versus multiple conspiracy doctrine and its implications for concurrent or consecutive sentencing.[9] Regardless of the correctness of the judge's interpretation of the single/multiple conspiracy doctrine, his statements at the sentencing hearing leave no doubt that his intent was to impose concurrent sentences.[10]

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[9] The judge indicated that he was particularly concerned about (1) the possibility that counts 4 and 9 (conspiracy to distribute heroin and conspiracy to manufacture and distribute heroin) were basically the same charge and (2) the teachings of *United States v. Marable*, 578 F.2d 151 (5th Cir. 1978). This Court in *Marable* found that the double jeopardy clause barred prosecution of the defendant for conspiracy to possess cocaine with intent to distribute following a conviction for conspiracy to possess and distribute heroin. The court found that only one agreement existed based on a discussion of five factors. The court concluded therefore that the cocaine conspiracy charged was the same conspiracy for which defendant Marable had already been convicted. Without engaging in dicta on the implications of the *Marable* decision, this Court notes that, beyond question, consecutive sentences could have been imposed in the instant case for any of the first three counts and Count 9. *See United States v. Rodriguez*, 612 F.2d 906 (5th Cir. 1980) (*en banc*), *aff'd sub nom. Albernaz v. United States*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981); *United States v. Borchardt*, 698 F.2d 697 at 701-03 (5th Cir. 1983). *See also Missouri v. Hunter*, ... U.S. ....., 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).

[10] If any room for doubt did exist, the Judgment and Probation/Commitment Order signed by the trial judge eliminates that doubt. The trial court's "Finding & Judgment" recites:

> Defendant has been convicted as charged of the offense(s) of conspiracy to distribute quantities of cocaine, 21:846 and 841(a)(1); conspiracy to distribute quantities of heroin, 21:846 and 841(a)(1); conspiracy to distribute quantities of marihuana, 21:846 and 841(a)(1); and conspiracy to manufacture quantities of heroin, 21:963 and 959, as charged in Counts 3, 4, 5 and 9 of the Indictment, respectively.

This Court will proceed to review the sufficiency of the evidence to support defendants' conviction on Count 3, which charged a conspiracy to distribute cocaine. In conspiracy cases the Government must prove beyond a reasonable doubt that (1) a conspiracy to accomplish an unlawful purpose existed, (2) the defendant had knowledge of the unlawful conspiracy, and (3) the defendant voluntarily agreed to join the conspiracy. *United States v. Jackson*, 700 F.2d 181 at 185 (5th Cir. 1983); *United States v. Pozos*, 697 F.2d 1238 at 1241 (5th Cir. 1983); *United States v. Bright*, 550 F.2d 240, 242 (5th Cir. 1977). In the instant case, the conspiracy to accomplish the unlawful purpose is plain. Indeed, defendants concede that Benito Montemayor and Salvador Flores were involved in a conspiracy to distribute cocaine. Defendants allege, however, that they were not willing participants in the conspiracy.

The *en banc* Court in *United States v. Alvarez*, 625 F.2d 1196, 1198 (5th Cir. 1980) (*en banc*), *cert. denied*, 451 U.S. 938, 101 S.Ct. 2017, 68 L.Ed.2d 324 (1981) set out the following standards for reviewing the sufficiency of the evidence to support findings of knowledge and joinder (the second and third elements of proof in a drug conspiracy): (1) the Government is not required to prove that the defendant had knowledge of all the details of the conspiracy provided the prosecution establishes defendant's knowledge of the essentials of the conspiracy; (2) a defendant cannot escape criminal responsibility on the grounds (a) that he did not join the conspiracy until well after its inception or (b) that he played only a minor role in the overall scheme. In evaluating a claim of insufficient evidence we must consider the evidence in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942) and resolve all reasonable inferences and credibility choices in favor of the jury's verdict. *United States v. Juarez*, 566 F.2d 511, 513 (5th Cir. 1978). The standard of review for sufficiency of the evidence is whether a reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. "It is not necessary that

the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. 1982) (*en banc*).

Applying these standards to the instant case we conclude that the evidence is sufficient to sustain a verdict of guilty for conspiracy to distribute cocaine. Concerning the second element of proof, knowledge of the unlawful conspiracy, the "aggregate of the evidence" is more than sufficient to establish that defendants "knew that criminal activity was afoot."[11] *See Alvarez*, 625 F.2d at 1198. The jury could have reasonably believed Bowman's testimony that defendants observed, if not assisted in, the loading of the fender wells of the Blazer with cocaine or money related to cocaine; that they weighed and packaged cocaine on the pool table in the guesthouse in McAllen; that, armed with shoulder bags, they conducted a drug-related meeting for two hours behind locked doors in Benito's bedroom; that they discussed cocaine deals during the meetings at the Monterrey brothel. Concerning the third element of proof, that the defendants voluntarily agreed to join the conspiracy, a jury might easily have concluded that defendants agreed to join the illegal conspiracy from Bowman's testimony that in the Monterrey brothel, both defendants gave their approval to a cocaine deal—that they agreed it was a "good deal." This Court therefore affirms defendants' convictions for conspiracy to distribute cocaine.

Having affirmed the convictions on Count 3, the concurrent sentence doctrine is invoked to decline review of

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[11] This Court is well aware that mere presence and association with those participating in a conspiracy is insufficient to sustain a verdict of guilt. *United States v. Escobar*, 674 F.2d 469, 478 (5th Cir. 1982). More than mere presence has been established in the instant case.

defendants' convictions on the remaining three counts.[12] In *United States v. Rubin*, 592 F.2d at 280, this Court held that a court may not apply the doctrine if there is a significant likelihood that the defendant will suffer adverse collateral consequences, *e.g.*, parole consequences, from the unreviewed convictions. In order to obviate any possible adverse consequences, this Court has on several occasions chosen to vacate the unreviewed convictions. *See United States v. Niver*, 689 F.2d 520, 531 (5th Cir. 1982); *United States v. Morisse*, 660 F.2d 132, 137 (5th Cir. 1981); *United States v. Cardona*, 650 F.2d 54, 58 (5th Cir. 1981). The circumstances under which this Court opted to vacate the unreviewed sentences in *Cardona* and *Morisse* are very similar to the circumstances of the instant case—challenges to the sufficiency of the evidence of the unreviewed convictions in drug cases. In the case at bar vacating the unreviewed convictions on Counts 4, 5, and 9 in no way alters the jury's verdict or the convictions themselves. The effect of this judicial action is to suspend imposition of the sentences.[13] No need of the Government is impaired; at the same time, no possibility of adverse collateral consequences to defendants exists. *See Cardona*, 650 F.2d at 58.

III. *Other Allegations*

A. *Coconspirator Hearsay Statements*

United States v. James, 590 F.2d 575 (5th Cir.) (*en banc*), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed. 2d 283 (1979) predicates admission of coconspirators' hearsay statements against a conspirator-defendant on proof of the existence of a conspiracy and the defendant's connection with it, *i.e.*, the coconspirator and the defendant were members of the conspiracy and the statements

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[12] The concurrent sentence doctrine serves the interests of judicial economy.

[13] The Government might at some later date ask that the sentences be reimposed "in the interests of justice." In such event, the convictions would then be subject to appellate review. *See United States v. Cardona*, 650 F.2d at 58.

were made during the course and in furtherance of the conspiracy. The defendants claim that *James* requires the district court to make this determination out of the hearing of the jury prior to admission of any such statements, and that the district court erred in allowing the Government to elicit such evidence from Bowman subject to later satisfaction of the predicate. The defendants are mistaken. The *James* court stated:

> The district court should, whenever reasonably practicable, require the showing of a conspiracy and of the connection of the defendant with it before admitting declarations of a coconspirator. If it determines that it is not reasonably practical to require the showing to be made before admitting the evidence, the court may admit the statement subject to being connected up.

Id. at 582. The district court did not err in allowing admission of Bowman's hearsay statements subject to later connection. At the close of Bowman's testimony, the court found that the *James* requirements were satisfied. The court's *James* finding is not clearly erroneous.

B. *Defendants' Motion to Dismiss the Indictment, Motion for a Bill of Particulars, and Motion for Disclosure of Grand Jury Transcript*

The indictment charged that the conspiracies ran from January 1, 1970 to the filing of the indictment (Nov. 17, 1981). The evidence at trial implicated Meynardo and Manuel in the conspiracies from the summer of 1977 and the fall of 1977, respectively.[14] Defendants contend that the indictment was insufficient due to the vagueness or open-endedness of the time period alleged for the con-

[14] The indictment was meant to provide the basis for prosecution of Benito, Matias, and Reyes Montemayor as well as their brothers and several lesser players. The scope of the evidence presented at trial may have been narrowed because Matias' trial was severed and Benito and Reyes fugitated.

spiracies charged in Counts 3, 4, 5, and 9. An indictment is sufficient if it (1) contains the elements of the offense charged and fairly informs a defendant of the charge against him and (2) enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974). Furthermore, it is generally sufficient that an indictment set forth the offense in the words of the statute itself as long as the statutory language unambiguously sets out all the elements necessary to constitute the offense. The language used must be sufficient to inform the accused of the specific offense with which he is charged. *Id.* 94 S.Ct. at 2907-08. While not overly precise, the indictment in the instant case was nonetheless sufficient in factual particularity. It clearly set out the elements of the offense, the specific code sections violated, and the names of six coconspirators. These elements were sufficient to meet the above requirements.

In asserting error in the denial of defendants' motion for a bill of particulars, defendants fail to allege surprise that prejudiced the preparation of their defense. *See United States v. Horton*, 526 F.2d 884, 887 (5th Cir.), *cert. denied*, 429 U.S. 820, 97 S.Ct. 67, 50 L.Ed.2d 81 (1976). The purpose of a bill of particulars is to apprise the defendant of the charge against him with sufficient precision to enable him to prepare his defense. *Id.* The denial of a bill of particulars is within the sound discretion of the trial judge; this Court can reverse only when it is established that defendant was actually surprised at trial and therefore was prejudiced in his substantial rights. *United States v. Hawkins*, 661 F.2d 436, 451-52 (5th Cir. 1981), *cert. denied*, ... U.S. ....., 102 S.Ct. 2274, 73 L.Ed.2d 1287, ... U.S. ....., 102 S.Ct. 2967, 73 L.Ed. 1355, ... U.S. ....., 103 S.Ct. 72, 74 L.Ed.2d 71 (1982). While the time period charged in the indictment could have been delineated with more precision, the indictment adequately put defendants on notice. Indeed, they do not claim prejudicial surprise at trial. The trial judge did not abuse his discretion in denying the bill of particulars.

Finally, defendants allege that the judge erred in denying their motion for disclosure of the grand jury transcript pursuant to *Dennis v. United States*, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966). *Dennis*, however, requires the defense to make a showing of "particularized need" in order to have access to the grand jury testimony of a trial witness. *Id.* 86 S.Ct. at 1849. First, defendants here did not even attempt to demonstrate a particularized need. They merely alleged that the grand jury testimony was hearsay and misleading. In fact, defendant Meynardo's attorney even admitted there was "possibly nothing useful in the grand jury testimony." Secondly, *Dennis* dealt with the right of a defendant to examine the grand jury testimony of a government trial witness; this right is codified in the Jencks Act, 18 U.S.C. § 3500. In the instant case, none of the witnesses called by the Government testified before the grand jury. We affirm the district court's denial of defendants' motion for production of the grand jury testimony.

C. *Admission of Scientific Evidence*

A DEA chemist, Edwin Albers, testified regarding his analysis of cocaine residue removed from the pool table in McAllen and the compartments behind the taillights of the Chevrolet Blazer. First, defendants argue that this evidence should have been excluded because they were not given adequate warning that it would be introduced and therefore were taken by surprise. Defendants claims of surprise are not well-founded. Two weeks before trial the Government agreed to allow defendants access to the pool table to obtain their own samples for independent testing, as the sample of the material recovered by the DEA chemist had been entirely consumed in the course of chemical analysis to determine the presence of cocaine. Defendants failed to take advantage of this opportunity to conduct their own vacuum sweep on the pool table. In fact, ten days before trial began, defendants had contacted a chemist to be on call. Furthermore, the DEA-7 report (the chemist's report) was available throughout

discovery under the Government's "open file" discovery provided in the case. Moreover, it is evident from defendants' motion to suppress that they had in fact seen the chemist's report by the first day of trial on January 26, 1982. It is true that defendants did not receive a copy of the spectra from the mass spectrometer test (run on both the sample from the table and the Blazer) until after the DEA chemist testified. During the trial, however, the judge held Albers overnight in the event that defendants should desire that their own expert analyze the spectrograph reports. Defendants failed to do so. Nor did they request a continuance for this purpose. *See United States v. Bockius*, 564 F.2d 1193, 1196-97 (5th Cir. 1977). Although defendants' claims of actual surprise may perhaps have more validity in the case of the residue from the Blazer, this evidence was largely cumulative of the evidence based on the residue from the pool table. Additionally, the DEA-7 report on the residue from the Blazer was available to defendants through the Government's "open file" discovery. Defendants have failed to establish surprise that prejudiced them in the presentation of their case through any delay of production of the chemist's reports or the spectra.

Second, defendants contend that Albers' testimony should have been excluded because defendants were denied samples of the material recovered by the DEA chemist from the pool table and the Blazer in violation of Fed.R.Crim.P. 16(a)(1)(C). Albers testified that there was no substance whatsoever left following the two tests performed on the material from the pool table (gas chromatograph and mass spectrograph); the only materials remaining after the two tests on the sweepings from the Blazer were lint, dirt, and residue from which all the cocaine had been extracted. Thus, the samples which were vacuumed from the pool table and the Blazer were entirely consumed by testing. Defendants' motion to suppress Albers' testimony[15] based on the Government's

[15] Their motion was made before Albers took the stand.

failure to provide a sample of the vaccumed material was therefore denied by the trial judge. The trial court concluded that since there was nothing the Government could provide, given that it had been necessary to use everything the Government had to conduct its own test,[16] the defendants could not be unfairly prejudiced on that account. This Court will not embark on a discussion of whether the substances were even discoverable under Fed.R.Crim.P. 16(a)(1)(C).[17] Assuming, *arguendo*, that the substances were discoverable, the issue would be whether the lack of the vacuumed material requires reversal because it would have been likely to change the verdict. *United States v. Gordon*, 580 F.2d 827, 837 (5th Cir.), *cert. denied*, 439 U.S. 1051, 99 S.Ct. 731, 58 L.Ed.2d 711 (1978) & 439 U.S. 1079, 99 S.Ct. 860, 59 L.Ed.2d 49 (1979). An important factor to consider in resolving this issue is whether the evidence was crucial to a determination of the guilt or innocence of the accused. *Id.* In the instant case, the judge dismissed all the substantive counts against defendants—it was only the conspiracy counts that went to the jury. Defendants could have conspired to distribute cocaine although they were entirely mistaken in the belief that the substance they had was actually cocaine. We conclude that the Government's failure to provide samples of the materials to defendants was not reasonably likely to have affected the verdict and that defendants, therefore, suffered no prejudice.

D. *Repolling the Jury*

Finally, defendants claim that the Court erred when it repolled the jury to determine if the guilty verdicts were

[16] The judge also pointed out to defendants that there could be no unfairness if the defense could obtain its own sweepings. As previously noted, defendants did not take the opportunity to do so.

[17] Given that the substances had been consumed through testing, the Government may not have been in "possession" of the substances within the meaning of the rule.

unanimous as to each of the three defendants. The jury returned a verdict of guilty as to all three defendants—Manuel, Meynardo, and Alifonso Arredondo. At the request of defense counsel, the district court polled the jury following the taking of the verdict. One of the jurors responded, "No, that is not my verdict . . . but I went along." At that point, someone noticed that the court reporter was not present. The court reporter was then brought in and the jury was repolled. This time, each juror was asked if he or she was in agreement with the verdict as to each of the three defendants separately. Each juror responded affirmatively, except the juror who had equivocated on the first polling. This juror, however, equivocated only as to co-defendant Arredondo. She specifically affirmed her belief that both Manuel and Meynardo Montemayor were guilty. The district court did not err in finding exactly which guilty verdict the equivocating juror found troublesome. As the Government states in its brief, to fault the Court for determining this fact is to blame the messenger for the message.

IV. *Conclusion*

We AFFIRM the conviction for conspiracy to distribute cocaine as to both defendants. The convictions on the remaining three counts are VACATED as to both defendants.

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

No. B-81-811

UNITED STATES OF AMERICA,

v.

MONTEMAYOR, ET AL.,

TRIAL COURT'S DOCKET ENTRIES

DATE	MAGISTRATE PROCEEDINGS
10-14-81	Affidavit for Search warrant filed. Search warrant issued and delivered to S/A John B. Powell, DEA, McAllen, Texas.
10-14-81	Complaint filed as to Defts. Benito, Meynardo & Manuel Montemayor. Warrants of arrest issued as to each deft. and delivered to the U.S. Marshal.
10-16-81	Amended complaint filed as to defts. Benito, Meynardo & Manuel Montemayor. Warrants of arrest issued as to each deft. & delivered to the U.S. Marshal.
10-21-81	Order signed by Judge James De Anda setting amount of Bail on Meynardo & Manuel Montemayor at $1,500,000.00.
10-21-81	Warrants issued on 10/14/81 (3) returned unexecuted as they were superseded by amended warrants on 10/16/81.
10-21-81	Executed Warrant of Arrest as to Meynardo Montemayor returned for filing.

DATE MAGISTRATE PROCEEDINGS

10-22-81—Deft. Meynardo Montemayor's Motion for Immediate Preliminary hearing & for Dismissal of charges filed.

10-22-81—Deft. Manuel Montemayor's Motion for Immediate Preliminary hearing & for Dismissal of charges filed.

10-23-81—Executed Search Warrant returned and filed.

10-26-81—Received and filed papers from U. S. Magistrate Tom N. Goodwin in Laredo, Texas as to deft. Meynardo Montemayor as follows:

1) Initial appearance minutes.
2) Temporary Commitment.
3) Copy of warrant of arrest.
4) Criminal Docket Sheet.

11- 4-81—Defts. Manuel & Meynardo Montemayor First Motion for Bond Reduction filed.

11- 4-81—Received and filed papers from U. S. Magistrate Eduardo E. De Ases of Corpus Christi, Tx. as to Defts. Meynardo & Manuel Montemayor as follows:

1) Courtroom Minutes of hearing held 10/30/81.
2) Order signed & entered at Corpus Christi, Tx. on 11/3/81 by U. S. Magistrate Eduardo De Ases.
3) Original & copies of:
   a) Affidavits.
   b) Motion to Dismiss charges & Discharge Defts. because of failure to provide bond hearing.
   c) Motions to Dismiss charges & Discharge Defts.

11- 6-81—Received and filed papers from U. S. Magistrate H. Lingo Platter as to Deft. Manuel Montemayor as follows:

1) Docket Sheet.
2) Copy of Warrant.
3) True Copy of Order signed by U. S. Magistrate H. Lingo Platter on 10/21/81.

DATE	MAGISTRATE PROCEEDINGS
11- 6-81	Courtroom Minutes hearing held on Nov. 6, 1981 before Judge Filemon B. Vela.
11-16-81	Notice of Appeal re: Bond Reduction filed. (Manuel Montemayor & Meynardo Montemayor)
11-16-81	Court Reporter's Transcript of Hearing on 11-6-81 filed.
3- 3-82	Received from Fifth Circuit Court of Appeals Copies of record, 1 vol. and 2 vols. of Transcript.

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

No. B-81-811

UNITED STATES OF AMERICA,

v.

MONTEMAYOR, ET AL.,

TRIAL COURT'S DOCKET ENTRIES

DATE	PROCEEDINGS
11-17-81	—[1]* Indictment filed. 1m
11-17-81	—[2] (WMM) Order for issuance of bench warrants and setting amount of bail filed. Warrants issued on the following: Benito Montemayor $2,500,000c/s Matias Montemayor $1,500,000c/s Reyes Montemayor $1,500,000c/s Salvador Flores, Jr. $250,000c/s Alfonso Arredondo, Jr. $250,000c/s Joe Garcia, aka Peanuts $250,000c/s 1m DD 11/25/81
11-18-81	—Arraignment Notice for Nov. 24, 1981 at 8:00 a.m. before Magistrate Mallet mailed to all parties. (Meynardo Montemayor) (Manuel Montemayor) (Matias Montemayor) 1m DD 11/25/81

* Numbers in brackets following file dates refer to the Record Document Numbers.

DATE	PROCEEDINGS
11-20-81	[3] (WMM) Minutes of initial appearance filed. Arrendondo AUSA, not present; Atty not present. Deft advised of charges and rights. Deft will seek retained counsel. Deft may employ Ramon Garcia. Bond set at $250,000 c/s. Deft remanded to USM. Arraignment set for Tues., Nov. 24, 1981 at 8:00 a.m. before Judge Mallet. Deft waives preliminary hearing. 1m DD 11/25/81
11-20-81	[4] Govt's application for order of prohibition filed. 1m DD 11/25/81
11-20-81	[5] (JDA) Order of prohibition filed. All parties ntfd. 1m DD 11/25/81
11-23-81	[6] Reporter's Transcript of Proceedings of October 30, 1981, filed. 1m DD 11/25/81
11-24-81	[7] (WMM) Minutes of arraignment filed. (Arredondo) Tape 517A-249 dc/1m AUSA, John P. Smith, Jack Wolfe; Atty, Ramon Garcia. Deft advises the Court that his first name is Alifonso and consents to clerk correcting indictment. Deft waives formal reading of the Indictment. P/NG to Cts. 3, & 6-9 entered. Deft remains in custody of USM. Motions Due December 21, 1981. Final Pre-Trial Jan. 4, 1982 at 8:30 a.m. Jury Selection Jan. 6, 1982 at 8:30 a.m. 1m DD 11/25/81
11-25-81	[8] Return on Warrant for Arrest of Deft Alfonso Arredondo, Jr. executed 11/20/81, filed. 1m
11-25-81	Return on service of Order of Prohibition served [9] Matias Montemayor on 11/20/81, filed. [10] Manuel Montemayor on 11/20/81, filed. [11] Meynardo Montemayor on 11/20/81, filed. 1m

DATE	PROCEEDINGS
11-25-81—	(EdA) Minutes of arraignment at Corpus, filed. [12] Matias Montemayor [13] Meynardo Montemayor [14] Manuel Montemayor AUSA, John P. Smith; Atty Matias Morin. P/NG to all cts entered. Defts remain in custody of USM. Motions due Dec. 14, 1981. Final Pre-Trial Jan. 4, 1982 at 8:30 a.m. Jury Selection Jan. 6, 1982 at 8:30 a.m.
11-25-81—	[15] (WMM) Appearance bond $250,000 w/$10,000 deposit executed. Alifonso Arredondo 1m
11-30-81—	[16] Return on Warrant for Arrest of Deft Matias Montemayor executed 11/25/81, filed. 1m
12- 7-81—	[17] Return on Warrant for Arrest of Deft Salvador Flores, Jr. executed 12/3/81, filed. 1m
**********	see 17a & 17b below: (After #19)
12-14-81—	[18] Return on Warrant for Arrest of Deft Joe Garcia aka Peanuts executed 12/8/81, filed. 1m
12-14-81—	[19] (WMM) Minutes of arraignment filed. (S. Flores, Jr.) Tape #527A-200 dc/1m AUSA John P. Smith; Atty Charles L. Carlson. P/NG to Cts. 3, 4, 5 & 9 entered. Deft remains in custody of USM. Motions Due, Jan. 11, 1982. Final Pre-Trial Feb. 1, 1982 at 8:30 a.m. Jury Selection Feb. 3, 1982 at 8:30 a.m. 1m DD 12/14/81
**********	
12- 8-81—	[17a] (DRG°) Initial Appearance Minutes filed. (E. Garcia) °Justice of the Peace Deft w/o counsel, advised, will seek retd counsel, Remanded to US custody, Arraignment set 12-16-81 at 10:00 a.m.

DATE	PROCEEDINGS
12-09-81—	[17b] (WMM) Initial Appearance Minutes filed. (Flores) Deft w/o counsel, advised, requests apptd counsel, Financial Affidavit issd & execd Arraignment set 12-14-81 at 9:30 a.m.
**********	
12-14-81—	[20] (WMM) Minute Entry filed. (Montemayors) Date for Motion extd to 12-23-81
12-14-81—	[21] Financial Affidavit filed. (Flores)
	[21a] CJA-20 filed. Charles Carlson apptd.
12-15-81—	[22] (WMM) Initial Appearance Minutes filed. (Garcia)
	Interpreter. Deft w/o counsel, advised, True Name-Eufracio Garcia, requests apptd counsel; FPD apptd; Remanded to US Custody. Arraignment set 12-18-81 at 10:00 a.m.
	[23] (WMM) Order appointing public defender filed. (Garcia)
	[24] Financial Affidavit filed (Garcia)
12-16-81—	[25] (FGG) Arraignment Minutes filed. (Garcia) Tape 526B-280 Interpreter Deft waives reading, pleas Not Guilty to Cts. 3, 4, & 9, Remains in US custody.
	Motions Due 1-15-82
	Final Pre-Trial 2-01-82 at 8:30 am
	Jury Selection 2-03-82 at 8:30 am
12-17-81—	[26] Motion to require disclosure of informer filed. (Arredondo)
	[27] Motion for hearing re: conspiracy filed. (Arredondo)
	[27a] Memorandum of law re: conspiracy hearing filed. (Arredondo)
	[28] Motion for leave to file add'l motions filed. (Arredondo)
	[29] Motion for severance filed. (Arredondo)
	[30] Motion to require govt to reveal agreements filed. (Arredondo)
	[31] Motion to produce exculpatory & mitigating evidence filed. (Arredondo)

DATE	PROCEEDINGS
12-21-81—	[32] Appearance bond filed. (Garcia)
12-28-81—	[33] Motion To Suppress filed. (Manuel & Meynardo Montemayor)
	[34] Motion To Sever filed. (Matias Montemayor)
	[35] Motion To Sever filed. (Manuel Montemayor)
	[36] Motion To Sever filed. (Meynardo Montemayor)
	[37] Motion To Quash Search Warrant & To Suppress filed. (All Defts)
	[38] Application For Change of Venue filed. (All Defts)
	[39] Motion For Continuance filed. (All Defts)
	[40] Motion To Dismiss . . . filed. (All Defts)
	[41] (2nd) Motion To Dismiss . . . filed. (All Defts)
1- 4-82—	[42] (JDA) Minutes of pre-trial proceedings, filed.
	[43] Motion to Substitute Counsel, filed. (Matias Montemayor)
	[44] Motion for Continuance, filed. (Matias Montemayor)
	Court will allow the law firm of Foreman, DeGuerin & DeGuerin to represent deft. Matias Montemayor but will not release Mr. Morin and Mr. Guianan from the case. Atty Michael Guianan is not present. Court will have a show cause hearing on Atty Guianan on Wednesday, January 6, 1982 at 9:30 A.M. F.P.T. set for Wed. 1/6/82 at 9:30 A.M. before Judge DeAnda. All defts and counsel was so notified. Possibility of conflict of attorneys was discussed in regards to deft. Matias Montemayor. Court orders the tapes of proceedings before U.S. Mag. Ed. DeAses. Judge DeAnda to call Judge Lucas in L.A., California. DD 1/5/82

DATE	PROCEEDINGS
1- 6-82—	[45] (JDA) Minutes of pre-trial, filed. Motion for substitution of Counsel granted. Deft. Matias Montemayor severed from this case. Set for FPT 3/1/82 at 2:00 P.M. Defts. Alfonso Arredondo, Jr., Meynardo Montemayor & Manuel Montemayor will go to trial January 25, 1982 at 9:30 A.M. Motion for Change of Venue will be carried along with case. Motion to Dismiss Indictment Motion to Quash Warrant-to be carried along with case. Motion to Suppress-along with case or it may be withdrawn. Deft. Arredondo's Motion for James Hearing carried w/case. Motions in regards to any agreements will be made available if any. Motion for Severence Denied. [46] Defendants' First Amended Motion to Dismiss the Indictment and Discharge Defendants, filed. [47] Deft. Matias Montemayor's Supplement to Motion for Continuance, filed. [48] (WMM) Minute Entry, filed. Deft. Flores' request deadline for filing motions extended to 1-15-82.
1- 6-82—	[49] Minutes of Jury Selection, filed. ltg./sa Jury is Voir dired by Court. Court feels case should be transferred to another division of this district. Motion for Change of Venue is granted. Deft. Matias Montemayor is reinstated and is transferred along with defts. Court will enter Order to that effect. E.T.T. 1 week.

DATE	PROCEEDINGS
1-11-82—	[50] Motion for Intra-District Change of Venue, filed. (Matias Montemayor) [51] (JDA) Minutes of hearing, filed. ltg/sa (Matias Montemayor) Final pre-trial is reset to Tuesday, March 9, 1982 at 9:30 A.M. Notice to counsel and deft. will be mailed once the Court decides place of trial.
1-14-82—	[52] Deft Flores' motion in Limine, filed. [53] Motion for Separate Hearing to Determine Existence of Conspiracy for Invocation of Rule 801(d)(2)(E), F.R.Cr. P. with authorities (Rule 104, F.R.EV. Hearing, filed. [54] Motion to Dismiss Indictment or to Elect, filed. [55] Motion to Discover Defendant's Prior Record, filed. [56] Motion to Produce Exculpatory & Mitigating Evidence, filed. [57] Motion to Discover Criminal Records of Witnesses, filed. [58] Motion to Require the Government to Reveal any Agreement entered into between the Government and any prosecution witness that could conceivably influence their testimony, filed. [59] Motion for Leave to File Additional motions, filed.
1-15-82—	[60] Deft. Joe Garcia's Motion for Bill Of Particulars, filed. [61] Motion to Produce Exculpatory and Mitigating Evidence, filed. [62] Motion for Separate Hearing to Determine Existence of Conspiracy, filed. [63] Motion for Discovery, filed. [64] Motion to Dismiss Indictment or to Elect, filed.

DATE	PROCEEDINGS
	[65] Motion to Require the Government to Reveal any Agreement entered into between the Government & Any Prosecution Witness that Could Conceivably Influence Their Testimony, filed.
	[66] Motion for Leave to File Additional Motions, filed.
	[67] Deft's Motion for Bill Of Particulars, filed. (Manuel Montemayor) (Meynardo Montemayor)
	[68] Deft's Motion for Bill of Particulars, filed. (Salvador Flores, Jr.)
1-20-82—	[69] Received from the Fifth Circuit Court of Appeals Order Dismissing Appeal, filed. Pursuant to Local Rule 9.2.2, the appeal was duly entered dismissed for want of prosecution for failure of appellants to file their briefs within the time fixed by the rules this 18th of Jan. 1982.
	(As to defts Manuel & Meynardo Montemayor) og DD 1/21/82
	Re:Manuel & Meynardo Montemayor & Arrendondo
1-26-82—	[70] (JDA) Jury Selection & 1st Day Jury Trial Minutes filed, in Houston, Texas Rptr-Corr Voir Dire. Jury selected & sworn. Motion to Dismiss-Overruled. Motion to Suppress-Overruled. Deft Arrendondo Objection to Change of Venue-Overruled.
	[71] Deft Arrendondo's Exhibit List filed. Opening Statements. Rule invoked. Witness called & testify. Case continued to 1-27-82.
1-27-82—	[72] (JDA) 2nd Day Jury Trial Minutes filed. Rptr-Corr (Manuel & Meynardo Montemayor & Arrendondo) Court finds evidence for "James" case re: Arredondo. Montemayors' Motion to Strike Testimony of Witness Bowman-Overruled.

DATE	PROCEEDINGS
1-27-82—	Arrendondo, Manuel & Meynardo, Montemayor
1-27-82—	2nd Day Jury Trial Minutes filed.-In Houston Motion For Mistrial-Overruled. Court finds evidence for "James" case re: Montemayors. 2nd Motion for Mistrial (Arrendondo)-Overruled. Montemayors' Motion to Dismiss-Overruled. Motion To Strike Testimony of Witness Bowman-Overruled. Motion To Strike Testimony of Witness Carpenter-Overruled. [73] Motion To Inspect Substance filed-Overruled. [74] Motion To Suppress-Overruled. [75] Motion In Limine filed.-Overruled. Trial continued to 1-28-82 at 9:00 a.m.
1-28-82—	[76] (JDA) 3rd Day Jury Trial Minutes filed. In Houston-Arredondo, Manuel & Meynardo Montemayor-Rptr-Corr. Motion for Judgment of Acquittal Cts. 6-8. Court Dismissed Counts as follows: 6, 7, 8, 14, 15, & 16. Motion for Acquittal in remaining counts Overruled. Motion In Limine reurged-Overruled. Motion to Strike testimony-Overruled. Defts Opening statements. Trial continued to 1-29-82 at 9:15 a.m.
1-29-82—	[77] (JDA) 4th Day Jury Trial Minutes filed. In Houston-Arredondo, Manuel & Meynardo Montemayor. Rptr-Corr. Juror Abnez excused, replaced w/1st alternate. Motion In Limine-Overruled. Arrendondo's Motion for Mistrial-Overruled. Montemayors' Motion for Mistrial-Overruled. [78] Govt's Exhibit List filed. [79] Defts' Exhibit List filed. Defts' Objection to Court Jury Charge-Overruled.

DATE	PROCEEDINGS
	[80] Defts' Requested Jury Instructions filed. Jury deliberates; case continued to 2-1-82 at 9:00 a.m.
	[80a] (JDA) Hearing Minutes fld. FPT f/3-9-82 at 9:30 a.m. JDA.
	[81] (JDA) Order filed. Marshal directed to provide jurors w/meals during sequestration.
2- 1-82—	[82] (ABH) 5th Day Jury Trial Minutes filed In Houston-Arredondo, Manuel & Meynardo Montemayor-Rptr-Gettig Jury continues deliberation
	[83] Order filed. Marshal directed to provide jurors w/meal.
	[84] Jury Verdict filed:-Manuel Montemayor-Cts 3-5 & 9 Guilty; Meynardo Montemayor-Cts 3-5 & 9 Guilty; Arredondo-Cts 3 & 9 Guilty. Jury is polled-Juror Jelks states contrary verdict. Motions for Mistrial are Overruled. Arredondo committed to custody. PSI. Sentencing set 3-5-82 at 9:30 a.m. JDA in Houston.
	[85] (JDA) Final Pre-Trial Minutes filed. Rptr-Corr Jury Selection 2-3-82 at 9:30 a.m. ETT 3 days as to E. Garcia & Flores.
2- 3-82—	[86] (FBV) Rearraignment Minutes filed. (Flores) Rptr-Holloway. Deft sworn, advised, plea of Guilty to Ct. 5 accepted. PSI. Sentencing set 3-12-82 at 9:30 a.m. JDA.
	[87] Notice Of Negotiated Plea filed. (Flores)
	[88] (JDA) Jury Selection Minutes filed. (E. Garcia) Rptr-Corr Jury voir dired, selected, not sworn. Trial commence 2-8-82 JDA at 9:30 a.m. ETT 3 days.
	[89] Deft's Requested Voir Dire filed.
2- 5-82—	[90] Motion For New Trial &/or Judgment Notwithstanding the Verdict filed. (Manuel & Meynardo Montemayor)
	[91] Motion In Arrest of Judgment filed. (Manuel & Meynardo Montemayor)

DATE	PROCEEDINGS
	[92] Motion For Mistrial filed. (Manuel & Meynardo Montemayor)
	[93] Motion For Leave to Interrogate Jurors filed. (Manuel & Meynardo Montemayor)
	[94] Motion For New Trial filed. (Arredondo) #s 90-94 fwd to Chmbrs 2-8-82.
2- 9-82—	[95] Transcript of Excerpt of Jury Verdict filed. ref. #82 above.
2-10-82—	[96] (JDA) Minute Entry filed. (Meynardo & Manuel Montemayor & Arredondo) parties ntfd. Motion To Question Jurors—Denied. Hearing re: Post-Trial Motions set for 2-19-82 at 9:00 a.m. Ctrm 4 in Houston.
2-10-82—	[97] Govt's Motion To Dismiss Indictment filed. (Eufracio Garcia aka Jose Garcia, aka Peanuts) 1m DD 2/16/82
2-17-82—	*Matias Montemayor-De La Paz*
	[98] Motion To Quash Conspiracy Counts filed.
	[99] Motion To Quash Count 9, filed.
	[100] Motion To Quash Count 10, filed.
	[101] Motion To Quash Count 12, filed.
	[102] Bill Of Particulars As To Substantive Counts In The Indictment filed.
	[103] Motion For Bill Of Particulars Regarding Conspiracy Counts filed.
	[104] Motion For Bill Of Particulars As To Count 2 filed.
	[105] Motion To Dismiss Indictment For Prosecutorial Misconduct Before The Grand Jury filed.
	[106] Motion To Dismiss Indictment For Violation Of Due Process filed.
	[107] Motion To Disclose Psychiatric Record Of The Witness Ricky Bowman filed.
	[108] Motion To Disclose Plea Bargain Or Other Agreements With Government Witnesses filed.

DATE	PROCEEDINGS
	[109] Motion For Discovery And Inspection filed.
	[110] Motion In Limine Concerning Scientific Tests filed.
	[111] Motion In Limine In Reference To 1972 Prior Conviction filed.
	[112] Motion In Limine Concerning Extraneous Matters Involving Co-Defts filed.
	[113] Motion In Limine Regarding 1976 Sale Of Heroin To Frank Tucci filed.
	[114] Motion For Pre-Trial Evidentiary Hearing In Accordance With U.S. v. James filed.
2-17-82—	[115] Govt's Answer To Defendant's Motion In Arrest Of Judgment filed. (Manuel Montemayor De La Paz) 1m DD 2/17/82
2-19-82—	[116] (JDA) Minutes Of Hearing On Post Trial Motions filed. (Houston) (Meynardo and Manuel Montemayor and Alifonso Arredondo, Jr.) Ct. Rptr. Clint Gettig AUSA John P. Smith and James R. Gough; Attys Michael Guinan and Matias Morin and Ramon Garcia. Court declares a Mistrial as to Deft. Arredondo. Deft Arredondo's oral request to be released on his original bond Granted. Motions as to the verdict-Denied. Motion to Interview each Juror-Denied. Court will consolidate the trials of Defts Arredondo and Matias Montemayor in Houston. Sentencing for Meynardo & Manuel Montemayor reset to March 5, 1982 at 9:30 a.m. in Houston. Minutes Of Hearing Of Post Trial Motions Defts Arredondo and Matias Montemayor set for Final Pre-trial on March 9, 1982 at 9:30 a.m. in Houston: motions due on March 2, 1982 and Govt's response by March 7, 1982. 1m DD 3/2/82

DATE PROCEEDINGS

3- 3-82—Received from Fifth Circuit Court of Appeals copies of Record, 1 vol. and 2 vols. of transcript. og

3- 3-82—[117] Govt's Information Of Prior Conviction filed. (Matias Montemayor) 1m DD 3/4/82

3- 4-82—[118] Deft's Motion To Disclose Identity Of Material Witness filed. (Matias Montemayor) 1m DD 3/4/82

3- 5-82—[119] Govt's Motion In Limine Concerning Ricky Lee Bowman filed. (Matias Montemayor & Arredondo) 1m DD 3/5/82

3- 8-82—[120] Deft's Motion For Separate Hearing To Determine Existence Of Conspiracy and Memorandum Of Law filed. (Arredondo) 1m

3- 8-82—[121] Deft's Motion To Produce Exculpatory And Mitigating Evidence filed. (Arredondo) 1m

3- 8-82—[122] Deft's Motion For Severance Of Parties filed. (Arredondo) 1m

3- 8-82—[123] Govt's Motion In Limine Concerning Ricky Lee Bowman filed. (Matias Montemayor & Arredondo) 1m

3- 8-82—[124] (JDA) Memorandum And Order filed. All ntfd. Motions for Mistrial and/or New Trial Denied and the jury verdict ordered filed. (Manuel & Meynardo Montemayor) 1m DD 3/12/82

3- 9-82—[125] Govt's Answer To Defendant's Motion For Bill Of Particulars As To Count 2, filed. 1m

3- 9-82—[126] Govt's Answer To Defendant's Bill Of Particulars As To Substantive Counts In The Indictment filed. 1m

3- 9-82—[127] Govt's Answer To Defendant's Motion For Bill Of Particulars Regarding Conspiracy Counts filed. 1m

DATE	PROCEEDINGS
3- 9-82—	[128] (JDA) Minutes Of Sentencing & Final Pre-Trial filed. (Meynardo, Manuel, Matias Montemayor & (Alifonso Arredondo, Jr.) at Houston, Tx. Ct. Rptr. Joyce Schofer 1tg/1m Sentence Meynardo & Manuel Montemayor: Cts. 3, 4, 5 & 9: 15 yrs impris & $25,000 fine to run cc. Court consolidates Cts. 3, 4, 5 & 9. Court feels only one conspiracy exists. Right to appeal w/in 10 days. Appeal Bond set at $1,500,000.00 c/s. Final Pre-Trial: Matias Montemayor & Arredondo Defts' Motion for Severance Denied. Atty Szekely's Motion for Bill of Particulars Denied; Motion to Quash Ct. 9 Overruled and any like motion on other counts Overruled. Motion to Quash Ct. 10 under advisement. Motion to Quash Ct. 12 Denied. Bill of Particulars #2 Overruled. Motion to Dismiss Indictment based on denial of due process held in abeyance at this time. Motion to Disclose Psychiatric Record of Wit. Bowman-court will review record before ruling. Motion to Disclose any agreement-Mr. Smith will comply. Motion for Discovery and Inspection Satisfied. Motion in Limine regarding scientific test to be taken up prior to jury selection. Court will have another pre-trial after the jury selection on Friday, March 26, 1982 at 2:00 p.m. Motion in Limine re: 1972 conviction will probably be granted. Motion in Limine re: 1972 conviction is Granted. Motion for James Hearing carried along w/case. Attorney Garcia adopts all motions made by Atty Szekely. 1m DD 3/15/82
3-10-82—	[129] (JDA) Order Dismissing Indictment filed. (Eufracio Garcia aka Peanuts) 1m DD 3/15/82

DATE	PROCEEDINGS
3-10-82—	[130] (JDA) Judgment And Commitment Order filed. (Meynardo Montemayor-De La Paz) 1m DD 3/15/82
3-10-82—	[131] (JDA) Judgment And Commitment Order filed. (Manuel Montemayor-De La Paz) 1m DD 3/15/82
3-12-82—	[132] Notice Of Filing, filed. (As to deft Meynardo Montemayor) DD 3/15/82 og
	[133] Notice Of Appeal, filed. (As to deft Meynardo Montemayor)
3-12-82—	[134] Notice Of Filing, filed. (As to deft Manuel Montemayor)
3-12-82—	[135] Notice Of Appeal, filed. (As to deft Manuel Montemayor) DD 3/15/82 og
3-12-82—	[136] Description Of Parts Of The Transcription Appellant Intends To Include In The Record And Statement Of The Issues He Intends To Present On Appeal, filed. (As to deft Meynardo Montemayor)
3-12-82—	[137] Description Of Parts Of The Transcription Appellant Intends To Include In The Record And Statement Of The Issues He Intends To Present On Appeal, filed. (As to deft Manuel Montemayor) DD 3/15/82 og

[Certification omitted in printing]